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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CANDELARIO CARRENO, Defendant and Appellant.	B285952 (Los Angeles County Super. Ct. No. KA031524)

APPEAL from an order of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Reversed and remanded with directions.

Leslie Reyes for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

In 1996 Candelario Carreno (under the name Alvaro Barras Perez) pleaded guilty to one count of possession of cocaine base for sale in violation of Health and Safety Code section 11351.5. Carreno served his sentence, and in 2017 filed a motion to vacate his plea pursuant to Penal Code section 1473.7, subdivision (a)(1).[1] The superior court denied the motion, emphasizing it had been 21 years since Carreno had entered his plea. Carreno appeals.

We conclude the superior court's focus on the length of time between appellant's plea and his request for relief under section 1473.7 as the basis for denying the motion, together with its lack of findings regarding the grounds for the motion, demonstrate that the court misconstrued the requirements for relief under section 1473.7 and failed to properly consider appellant's motion on its merits. Accordingly, we reverse and remand the matter to the superior court for a hearing on the merits of the motion.

BACKGROUND

In accordance with the terms of his guilty plea on April 24, 1996, appellant was sentenced to three years of probation, with the first 180 days to be served in county jail.[2] Thereafter, on October 24, 2013, the superior court denied appellant's petition for reduction, termination, and dismissal of the 1996 conviction

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[1] Undesignated statutory references are to the Penal Code.

[2] On June 24, 1996, probation was revoked and appellant sentenced to five years in state prison with execution of the sentence suspended. Probation was reinstated as modified, and appellant ordered to complete his 180 days in the tree farm program. Appellant was further ordered "not to re-enter this country illegally."

under section 1203.4, subdivision (a). Appellant then filed a motion to vacate the judgment under section 1016.5 on January 15, 2015, in which he averred he faced deportation proceedings as a result of the 1996 conviction. That motion was denied, and appellant filed his motion to vacate his plea pursuant to section 1473.7, subdivision (a)(1) on June 19, 2017.

In the motion to vacate appellant argued that at the time he entered his plea, defense counsel failed to advise him about the possible immigration consequences of his plea and did not make any attempt to negotiate a plea with less harmful immigration consequences. Appellant further maintained that his attorney's deficient performance constituted ineffective assistance of counsel by which he was prejudiced.

The superior court denied the motion, noting that when appellant entered his plea agreement 21 years ago, Bill Clinton was President. The court added, "21 years is a long time. Certainly the old civil doctrine of laches would certainly be an appropriate comment at this point." The court also observed that appellant's illegal status was "reflected in his own statement" attached to the files. Moreover, in entering his plea, appellant had initialed the paragraph in the waiver form in which he acknowledged, "I understand that if I am not a citizen of the United States, the conviction for the offense charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The court also found that as a result of his probation violation, appellant "was certainly aware that there were consequences." Declaring that while appellant's defense counsel is "a pretty good lawyer, . . . he [doesn't read] the future very well at all." The superior court concluded, "I think what we're dealing with here is a revisionist's view of history and a

self-serving declaration. I don't think he qualifies. I don't think there's anything the lawyer could have done to foresee 21 years into the future."

DISCUSSION

Section 1473.7 creates an explicit right for a noncitizen previously convicted pursuant to a guilty plea who is no longer in criminal custody to move to vacate the conviction on the ground that "[t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1); *People v. Espinoza* (2018) 27 Cal.App.5th 908, 913–914.) Such prejudicial error may arise from counsel's failure to inform the defendant of the adverse immigration consequences of his or her plea. (*People v. Morales* (2018) 25 Cal.App.5th 502, 505.)

In general, the superior court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Aguirre* (2016) 199 Cal.App.4th 525, 528.) However, where such a motion raises ineffective assistance of counsel and thereby implicates a constitutional right, "we uphold the trial court's factual findings if they are supported by substantial evidence and we exercise our independent judgment on the legal issues." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76; *People v. Cromer* (2001) 24 Cal.4th 889, 894.) Thus, a trial court may be found to have abused its discretion if its factual findings are not supported by substantial evidence or if it misinterprets or misapplies the applicable legal standard. (*People v. Smith* (2016) 245 Cal.App.4th 869, 873; *Global Modular, Inc. v. Kadena Pacific, Inc.* (2017) 15 Cal.App.5th 127, 150.)

With these principles in mind, we conclude the superior court abused its discretion in denying appellant's motion to vacate his plea under section 1473.7. In ruling on the motion, the court completely ignored appellant's claim that upon accepting the plea he had not understood the severe immigration consequences it carried, but had relied on his attorney's assurances that the plea was the best option available. Specifically, while characterizing the claim as revisionist history and "self-serving," the court emphasized the 21-year gap between the conviction and the motion to vacate to suggest an unreasonable delay in bringing the motion and indicated defense counsel could not be faulted for failing to predict or prevent the adverse immigration consequences of the plea.

Contrary to the superior court's suggestion, however, there was no unreasonable delay in appellant's prosecution of his motion to vacate. Subdivision (b)(2) of section 1473.7 requires a party to act with "reasonable diligence" in seeking relief under subdivision (a)(1) by filing a motion after receiving notice of pending immigration removal proceedings or a removal order. Appellant began his efforts to vacate the conviction as soon as he received notice of the basis for the removal proceedings against him, and he diligently sought relief under section 1473.7 by filing his motion within six months of the effective date of the statute. The superior court's focus on the 21 years between appellant's plea and his motion to vacate highlights one of the many difficulties presented by challenging a guilty plea made 21 years earlier, but does not provide a basis under the statute for denying the motion.

The superior court's declaration that counsel could not be faulted for failing to predict or prevent removal proceedings 21 years in the future also constitutes an invalid basis for denying

appellant's motion. The proper inquiry on a motion to vacate a conviction based on the moving party's ignorance of the immigration consequences of a plea is not whether counsel should have predicted initiation of federal removal proceedings in the future, but the state of the defendant's understanding and acceptance of those ramifications at the time of the plea. While counsel's advice in the subject is certainly an important factor to consider, whether counsel could be expected to foresee the precise nature of the immigration consequences is irrelevant to the determination of the motion to vacate.[3]

Section 1473.7, subdivision (e)(1) provides: "The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." Those grounds are limited to a showing of prejudicial error which damaged the party's ability to understand

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[3] In this regard, the recent amendment to the statute, which took effect January 1, 2019, shows the importance of assessing the state of mind of the defendant and not counsel at the time of the plea by clarifying that the trial court may, but need not find ineffective assistance of counsel in finding a plea invalid under section 1473.7, subdivision (a)(1), the recent amendment to the statute. (§ 1473.7, subd. (a)(1), as amended by Stats. 2018, ch. 825, § 2 (AB 2867); see also Assem. Floor Analysis of Assem. Bill No. 2867 (June 14, 2018) p. 2 [this bill clarifies "that a court may find that defense counsel was legally ineffective, but does not have to do so, in order to grant a motion to vacate a conviction or sentence that was obtained despite the defendant's inability to understand, defend against, or knowingly accept adverse immigration consequences"].)

or accept the immigration consequences of the guilty plea. Here, in moving to vacate under subdivision (a)(1), appellant averred that his attorney never inquired about appellant's immigration status and did not explain the actual immigration consequences he would face in pleading guilty to the charged felony. Appellant explained that he had been represented at his preliminary hearing by one attorney, and two weeks later at his arraignment by a different attorney. When appellant appeared in court for his arraignment his new attorney told him about the proposed plea deal and urged appellant to accept it because it would allow him to be released from custody that same day. Without further ado, the attorney handed appellant a plea form and had him initial the circled statements after the interpreter quickly read through each one. Appellant had no time to discuss the statements he initialed or the consequences of the plea with his attorney, who simply kept repeating that if he took the deal he would be released that day. Once appellant signed the form, the waivers were read aloud by the judge, appellant was sentenced in accordance with the plea, and he was released that day.

Appellant insisted that had he known that pleading to this offense would bar him from staying in the country or from ever returning if he left, he "would have never taken the plea bargain," and "would have asked [his attorney] to try to negotiate for alternative solutions." As his attorney on the section 1473.7 motion explained in her declaration, two such immigration-neutral alternatives could have been negotiated without any effect on the sentence offered by the district attorney, which was well below the statutory minimum for the charged offense.

In dismissing the evidence presented by appellant in support of the motion as "revisionist" and "self-serving," the superior court cited appellant's illegal status, the order that he

not reenter the country illegally at the time of the probation violation, and his acknowledgement of possible immigration consequences on the waiver form he initialed to support a conclusion that appellant did not qualify for relief under the statute. But neither appellant's illegal status nor the specific prohibition on illegally reentering the country has any bearing on whether appellant was able "to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences" of his plea *at the time he entered it*. (§ 1473.7, subd. (a)(1).)

Further, appellant's "meaningful" understanding and knowing acceptance of immigration consequences that included virtually assured deportation and exclusion under the immigration laws cannot be presumed based on appellant's initialing of a standard advisement that merely described the possibility of removal as something that *may* happen as a consequence of the plea. (See *United States v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 790 (*Rodriguez-Vega*).)[4] The offense to which appellant pleaded guilty—possession for sale of cocaine base—is defined as an aggravated felony under federal law. (8 U.S.C. § 1101(a)(43)(B); *People v. Bautista* (2004) 115

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[4] As the Ninth Circuit put it, "Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty. As Judge Robert L. Hinkle explained, 'Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on.' *United States v. Choi,* Case No. 4:08–CV–00386–RH, Transcript, Docket No. 96, at 52 (D.Fla. Sept. 30, 2008)." (*Rodriguez-Vega*, *supra*, 797 F.3d at p. 790.)

Cal.App.4th 229, 237.) An alien convicted of an aggravated felony faces significant and certain immigration consequences. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 363–364 (*Padilla*) ["removal is practically inevitable"]; *Rodriguez-Vega*, *supra*, 797 F.3d at p. 786.) Indeed, such a person "is: (1) subject to deportation, 8 U.S.C. § 1227(a)(2)(A)(iii), and presumed deportable, *id.* § 1228(c); (2) ineligible to seek judicial review of a removal order, *id.* § 1252(a)(2)(C); (3) barred from eligibility for asylum, *id.* § 1158(b)(2)(A)(ii), (B)(i); (4) barred from receiving voluntary departure, *id.* § 1229c(a)(1); (5) disqualified from cancellation of removal, *id.* § 1229b(a)(3); and (6) subject to being taken into custody upon release from confinement, regardless of whether the release is on parole or supervised release, *id.* § 1226(c)(1)." (*U.S. v. Corona-Sanchez* (9th Cir. 2002) 291 F.3d 1201, 1209, fn. 8.) The fact that appellant was apparently told his plea *may* carry adverse immigration consequences falls far short of evidence giving rise to a presumption that he meaningfully understood or knowingly accepted those consequences.

Accordingly, we reverse the order denying appellant's motion to vacate his plea and remand to the superior court for consideration of the motion on its merits under section 1473.7 as amended.

DISPOSITION

The order denying the motion to vacate pursuant to Penal Code section 1473.7 is reversed. The matter is remanded to the superior court to conduct a de novo hearing in accordance with Penal Code section 1473.7.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.